Webco Industries, Inc. and United Steelworkers of America, AFL-CIO, CLC. Cases 17-CA-19047 and 17-CA-19120

# November 30, 1998 DECISION AND ORDER

# BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On May 4, 1998, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Acting General Counsel filed limited exceptions, a supporting brief, and a brief in support of the judge's decision. The Respondent filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions only to the extent consistent with this Decision and Order.<sup>3</sup>

The United Steelworkers Union conducted an organizing campaign among the Respondent's employees during February and March 1997. The judge found that, during the course of the campaign, the Respondent violated Section 8(a)(1) of the Act by disparaging the Union, threatening employees that they would lose benefits and that negotiations would start from "ground zero" if the Union became the employees' collective-bargaining agent, telling employees who supported the Union that they should quit, and engaging in surveillance of a union meeting. The Respondent has excepted to all the violations found.<sup>4</sup>

1. We find merit in the Respondent's exception that the judge erred in finding that it engaged in unlawful surveillance of a union meeting.

Employees attending a union meeting on the evening of April 4 saw the Respondent's vice president, Bill Obermark, drive past the union hall shortly before the meeting started. There is no indication in the record, however, that more than fortuitous circumstances caused Obermark to drive by the union meeting site. There is no showing, for example, that Obermark did not have business in the neighborhood, or that he did not use that route to drive home. Nor is there any evidence that the Respondent was aware that a meeting was to be held that evening. On this sparse record, then, we find that the General Counsel has failed to establish that Obermark's presence in the area was other than coincidental. Therefore, we reverse the judge's finding of an 8(a)(1) violation and dismiss this allegation of the complaint.

2. The judge found that the Respondent violated Section 8(a)(3) and (1) by disciplining several employees and by discharging Charles Thornton. We affirm the judge's findings that the Respondent's conduct was unlawful.<sup>5</sup> In so doing, we note that the judge found that the suspension of Stephanie Almy and its warning and termination of Thornton were unlawful because they were based on the Respondent's erroneous belief that Almy and Thornton had engaged in unacceptable conduct while soliciting on behalf of the Union.<sup>6</sup> In these circumstances, we find it unnecessary to decide whether the Respondent's actions violated Section 8(a)(3) as well as Section 8(a)(1), because the finding of an 8(a)(3) violation would not affect the remedy.<sup>7</sup>

The Respondent asserts, however, that since Almy was reinstated to her former position with backpay, she suffered no injury and no violation should be found. We disagree. In addition to the factors discussed by the judge, the Respondent has not fully repudiated its con-

<sup>&</sup>lt;sup>1</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>&</sup>lt;sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In this regard, however, we do not rely on the judge's finding that employee Charles Thornton called another employee "dumb and ignorant"; Thornton, whom the judge broadly credited, testified that he made no such statement. This error on the part of the judge does not undermine his otherwise well-supported finding that Thornton did not use a racial slur.

We correct sec. III, B, (a), iv, of the judge's decision, the last sentence of which should have referred to "Williams" rather than "Hubbard." We also correct sec. III, C, 2, d, (1) and III, C, 3, par. 4, by substituting "suspending" for "discharging" and "terminating," respectively.

We shall also modify the order pursuant to *Indian Hills Care Center*, 321 NLRB 144 (1996).
 We adopt the judge's finding that Supervisor Dan Marrs unlaw-

<sup>&</sup>lt;sup>4</sup> We adopt the judge's finding that Supervisor Dan Marrs unlawfully threatened employees that, if they chose the Union as their bargaining representative, negotiations would start from "ground zero." In context, we find that employees would reasonably believe that they would lose everything, or start at entry levels, and have to negotiate for the wages, vacations, holidays, and insurance they already had. "Such statements are objectionable when, in context, they effectively threaten employees with the loss of existing benefits and leave them with the

impression that what they may ultimately receive depends in large measure on what the Union can induce the employer to restore." *Plastronics, Inc.*, 233 NLRB 155, 156 (1977). That was exact tenor of Marrs' remarks

<sup>&</sup>lt;sup>5</sup> We find it unnecessary to rely on the judge's discussion of *Hammary Mfg. Corp.*, 265 NLRB 57 (1982), because we agree with the judge that the Respondent applied its no-solicitation rule in a discriminatory fashion against employees engaged in union solicitation.

The judge found that employee Hubbard would have been discharged for his conduct of March 1, even if he had not been engaged in union activities. In affirming the judge, we note, in addition to the factors he relied on, that other employees had previously been discharged for similar conduct.

<sup>&</sup>lt;sup>6</sup> NLRB v. Burnup & Sims, 379 U.S. 21 (1964). Thornton denied soliciting for the Union as well as harassing a fellow employee on March 1, as the Respondent contended, and the judge credited his testimony. However, because the Respondent believed that Thornton had been soliciting for the Union, the Respondent's warning to him violated Sec. 8(a)(1). See *Ideal Dyeing & Finishing Co.*, 300 NLRB 303 (1990), enfd. 956 F.2d 1167 (9th Cir. 1992).

<sup>&</sup>lt;sup>7</sup> Burnup & Sims, 379 U.S. at 2; see also *Ideal Dyeing & Finishing Co.*, supra, at 303 fn. 5.

duct with respect to Almy by adequately publishing such repudiation, assuring employees that it will no longer interfere with the exercise of their Section 7 rights, or refraining from further violations. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

Our dissenting colleague contends that the Respondent's actions were sufficient, and that the other Passavant conditions need not be met. In effect, he would overrule Passavant. His contention overlooks the fact that repudiation serves a purpose in addition to restoring the employer and the directly affected employee to each other's good graces. Repudiation signals unambiguously to the other employees that the Respondent recognizes that it has acted wrongfully, that it respects their Section 7 rights, and that it will not interfere with those rights again. Without such signals, there is no assurance that the coercive effects of the initial wrongful conduct will not linger in the workplace. The Board requires the posting of notices to like effect when it finds that employers and unions have violated employees' rights; parties should be required to do no less in order to avoid being found to have violated the Act by engaging in similar conduct.

Our colleague suggests, however, that by requiring adherence to all the standards set forth in *Passavant*, the Board discourages employers from taking prompt remedial measures and fosters lengthy litigation. He reasons that, if an employer or union fails to meet one of those standards, the relief it does provide will be unavailing, and, therefore, that such relief often will not be provided at all. The dissent's argument, at bottom, is that employers who realize that they have taken erroneous and possibly unlawful actions against their employees; nonetheless, will not take reasonable remedial measures to minimize their backpay exposure because they may still be required to post a notice if those measures prove to be inadequate. As that seems to run counter to employers' financial interests, the argument fails to persuade us. In any event, it ignores the fundamental remedial purpose of the Board's notice requirements.

3. We adopt the judge's finding that the Respondent's president, Dana Weber, disparaged the Union by telling employees that the Union was responsible for the Respondent's unlawful discipline of four of its employees. Although an employer is generally free to make critical comments about a union that is seeking to organize its employees, it violates Section 8(a)(1) of the Act when it takes adverse action against employees and falsely blames its action on the union. It thereby coercively suggests to employees that seeking union representation results in damage to their terms and conditions of employment. Thus, in *Feldkamp Enterprises*, 8 the Board found that the employer violated Section 8(a)(1) when it denied employees pay increases to which they were enti-

tled and blamed the denial on the union. Indeed, Weber's statements were even more coercive. She not only attempted to fix the blame for the Respondent's unlawful conduct on the Union; her remarks also constituted an implicit threat to take similar disciplinary action against the listening employees if they, too, should engage in protected conduct on behalf of the Union.

Our dissenting colleague contends that Weber's remarks are protected by Section 8(c) because they were based on a good-faith belief that the employees had violated its no-solicitation policy. We find no merit in that contention. As the judge found, the Respondent imposed harsher discipline on employees whose union solicitations violated the no-solicitation policy than on other employees who had engaged in equivalent solicitations unrelated to union matters. Also, in referring to the discipline imposed, Weber implicitly included the suspension of Stephanie Almy, even though Almy had denied violating the policy and an investigation of her conduct (which ultimately completely vindicated her) had barely In light of the Respondent's discriminatory treatment of union supporters and its evident disregard for the accuracy of its allegations directed toward them, we reject our colleague's suggestion that Weber's remarks were made in good faith.

The dissent also contends that *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), requires dismissal of this allegation because there is no showing that Weber uttered her statements with actual malice. We disagree. *Linn* was a libel case. Here, we are not finding that Weber libeled the Union. Rather, as we have found above, her remarks constituted implicit threats that other employees would risk being unlawfully disciplined if they also engaged in prounion activities. Such threats are not protected by Section 8(c). See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

# **ORDER**

The National Labor Relations Board orders that the Respondent, Webco Industries, Inc., Sand Springs, Oklahoma, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Warning, suspending, or discharging employees because they solicited other employees' support for the United Steelworkers of America, AFL-CIO, CLC (the Union).
- (b) Disparaging the Union to employees by falsely telling them that the Union was responsible for the unlawful discipline of the Respondent's employees.
- (c) Telling employees that if they select the Union as their bargaining representative, bargaining will start from ground zero or will start at employees' entry pay level, and that it would be futile for them to select the Union as their bargaining representative.
- (d) Telling employees who support the Union to quit their jobs.

<sup>8.323</sup> NLRB 1193, 1199 (1997).

- (e) Telling employees improperly disciplined for their union activities that they had been punished for soliciting employee support for the Union and handing out union literature.
- (f) Threatening employees with loss of benefits if they select the Union as their bargaining representative.
- (g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.
- 2. Take the following affirmative action designed to effectuate the policies of the Act.
- (a) Rescind the written warnings to employees Brad Powell and Charles Thornton, the suspensions of employees Thornton, Stephanie Almy, and Charles Williams, and the discharge of Thornton.
- (b) Within 14 days from the date of this Order offer, in writing, full reinstatement to Thornton to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (c) Make Thornton and Williams whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, as set forth in the remedy section of the judge's decision.
- (d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and discharge of the employees named above and, within 3 days thereafter, notify those employees, in writing, that this has been done and that this unlawful conduct will not be used against them in any way.
- (e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (f) Within 14 days after service by the Region, post at its Sand Springs, Oklahoma facility where notices to employees are customarily posted copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced, or covered by any other material. In the event that, during

the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 1997.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form to be provided by the Region attesting to the steps that the Respondent has taken to comply.

# MEMBER HURTGEN, dissenting in part.

Unlike my colleagues, I would not find that the Respondent, by its president, Dana Weber, unlawfully disparaged the Union regarding the Respondent's discipline of four employees. As recounted by the judge, Weber held employee meetings in which the Union's organizing campaign was discussed. Certain employees had been disciplined for allegedly violating the Respondent's nosolicitation policy. Weber told employees, among other things, that "either the Union failed to warn them (about Respondent's no-solicitation policy) or encouraged them to violate the policy." Weber also opined that the disciplined employees "had been potentially sacrificed by the Union for the benefit of the Union."

In my view, Weber's remarks were protected by Section 8(c). As the Board held in *Camvac International*, 288 NLRB 816, 820 (1988), Section 8(c) protects an employer's characterization of a union, and the employees are capable of evaluating the remarks for themselves. In this case, Weber simply expressed the opinions that (1) the employees violated the policy; and (2) the Union did not warn them about the policy or it encouraged them to breach the policy. Even if the opinions were factually incorrect, that would not mean that the statements lost the protection of Section 8(c). Opinions uttered in the context of a labor-management dispute are privileged unless they are maliciously false. There is no showing of such malice here.

The majority contends that Respondent "coercively suggest[ed] to employees that seeking union representation results in damage to their terms and conditions of employment." There is no evidence to support the contention. At most, Respondent suggested that soliciting in violation of the no-solicitation rule would lead to adverse employment consequences.

Similarly, the majority contends that Respondent's remarks were "an implicit threat against the listening employees if they, too, should engage in protected conduct on behalf of the Union." Again, my colleagues paint with too broad a brush. Respondent's remarks were solely in reference to breaches of the no-solicitation rule.

I recognize that the discipline of the employees has now been adjudicated as unlawful. However, Respon-

<sup>&</sup>lt;sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>&</sup>lt;sup>1</sup> Linn v. Plant Guards, 383 U.S. 53 (1966).

dent's defense was, and is, that the employees in fact violated the policy. There is no suggestion that the defense, although ultimately unsuccessful, was frivolous or proffered in bad faith. The fact that Respondent's defense is rejected here is not a reason to find unlawful the assertion of the defense.

The judge found that the statements were uttered in bad faith. However, that finding is based on the proposition that Respondent did not know whether its position would be upheld. As discussed above, I would permit an employer to state its position, pendente lite, unless that position is patently frivolous.

Finally, my colleagues rely on *Feldkamp*, 323 NLRB 1193 (1997). The case does not support their view. In that case, the employer unlawfully denied a wage increase, and said that the union was the cause of the denial of the increase. In the instant case, Respondent did not suggest that the Union caused the discipline. Respondent took full responsibility for that discipline. At most, Respondent suggested that the Union failed to warn employees about the conduct for which they were disciplined.

On a separate matter, I do not agree that a remedy is required with respect to Almy. Almy was unlawfully suspended on March 1, 1997. However, the suspension was revoked on March 15, 1997, and fully backpay was granted. In my view, this prompt corrective action is to be encouraged, and it obviates the necessity for a remedial decree.

In finding contra, my colleagues rely on *Passavant*, 237 NLRB 138 (1978). That case sets forth stringent conditions that a respondent must fulfill in order to avoid a remedial decree. Those steps are:

- 1. The repudiation of unlawful conduct must be "timely," "unambiguous," "specific in nature to the coercive conduct" and "free from other prescribed illegal conduct."
- 2. There must be adequate publication of the repudiation to the employees involved.
- 3. There must be no proscribed conduct on the respondent's part after the publication.
- 4. The repudiation should give assurances to employees that in the future the respondent will not interfere with the exercise of their Section 7 rights.

In my view, the Board should encourage employers and unions to take prompt remedial relief with respect to unlawful conduct that they may have committed. Particularly in the field of labor relations, time is of the essence, and justice delayed is often justice denied. In general, I would rather see an unlawful labor practice retracted promptly, than a court decision years later with a decree and remedial notice. The former is prompt, effective, and inexpensive in terms of private litigation costs and public expenditures. In addition, the prolongation of a labor dispute serves the interests of no one.

I believe that *Passavant* discourages prompt relief. If an employer or union stubs its toe on one of the conditions, its prompt relief will be of no avail. The result is that prompt remedial action is frequently avoided because it will not serve the purpose of ending the dispute and the attendant litigation. The majority responds that, quite apart from *Passavant*, respondents will take corrective action to toll backpay. Experience shows that some respondents do so and some do not. More importantly, Respondent here not only revoked the suspension (thereby tolling backpay), but also paid the backpay.

As noted, Respondent promptly rescinded Almy's suspension and gave full backpay to her. My colleagues nontheless contend that other employees were coerced by the conduct directed to Almy, and that the remedial action was not "published" to them. However, in my view, these other employees are far more likely to have their fears assuaged by the prompt remedial action given to Almy than they would be by a court decree years later. The shop floor opinion of the incident will be that she was vindicated. I would, therefore, treat Almy's suspension as effectively resolved.

The majority suggests that I am considering only the rights of the injured employee. The suggestion is inaccurate. As set forth above, I believe that all of the employees will be aware of the prompt remedy afforded to the injured employee, and their concerns will be assuaged thereby. Prompt remedial action does far more, in my view, to "signal" other employees that their Section 7 rights will be respected than does a notice posted years later.

Finally, I recognize that Almy was subjected to 8(a)(1) conduct after her reinstatement. However, her remedy of reinstatement and backpay remained intact, and the 8(a)(1) violation is being remedied here. I do not agree that the 8(a)(1) violation rendered the remedy ineffective.<sup>2</sup>

# **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize To form, join, or assist any union

<sup>&</sup>lt;sup>2</sup> As to employee Williams, the Respondent's suspension of him for 2 weeks was unlawful. Respondent then changed it to a 3-day suspension. However, the judge found that the 3-day suspension was independently violative because it was itself discriminatorily motivated. Where the "curative" action is itself unlawfully motivated, it obviously does not qualify as a remedy for the prior unlawful action.

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection To choose not to engage in any of these protected concerted activities.

Given all these facts, we give you the following assurances:

WE WILL NOT warn, suspend, or terminate our employees because they engage in protected concerted or union activities by soliciting support for the Union.

WE WILL NOT disparage United Steelworkers of America, AFL-CIO, to employees by falsely telling them that that the Union was responsible for the discipline and suspension of our employees on March 1, 1997.

WE WILL NOT tell employees that if they select the Union as their bargaining representative, bargaining will start from ground zero or will start at employees' entry pay level, and that it would be futile for them to select the Union as their bargaining representative.

WE WILL NOT tell employees who are union supporters to quit their jobs.

WE WILL NOT tell employees improperly disciplined for their union activities that they have been punished for soliciting employee support for the Union and handing out union literature.

WE WILL NOT threaten employees with loss of benefits if they select the Union as their bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL cancel, revoke, and rescind the wrongful warnings issued to Brad Powell and Charles Thornton, the wrongful suspensions of employees Stephanie Almy and Charles Williams, and the discharge of Charles Thornton.

WE WILL, within 14 days from the date of the Board's Order, offer Charles Thornton full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make Thornton and Williams whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against them

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discharge or discipline of the employees named above, and WE WILL, within 3 days thereafter, notify each named employee in writing that this has been done and that our unlawful conduct will not be used against him or her in any way.

# WEBCO INDUSTRIES, INC.

Francis A. Molenda, Esq., for the General Counsel. David E. Strecker and Robert C. Fries, Esqs. (Strecker & Associates, P.C.), of Tulsa, Oklahoma, for the Respondent.

#### DECISION

#### STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on September 23, 24, and 25, 1997, in Tulsa, Oklahoma, pursuant to an order consolidating cases, consolidated complaint and notice of hearing issued by the Regional Director for Region 17 of the National Labor Relations Board on April 30, 1997, and amended on July 7, 1997, based on a charge in Case 17–CA–19047 filed on March 3, 1997, by the United Steelworkers of America, AFL–CIO (the Union) against Webco Industries, Inc. (the Respondent) and amended on March 14, 1997, and a second charge in Case 17–CA–19120 filed on April 7, 1997, by the Union against the Respondent. Posthearing briefs were submitted by the General Counsel and the Respondent on November 20, 1997.

The complaint as amended alleges that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by disciplining, suspending, and terminating certain employees because of the employees' union activities and to discourage employees from engaging in such activities and by making certain statements to employees and taking certain actions violative of Section 8(a)(1) of the Act. The Respondent in its answer denies that it violated the Act as alleged.

#### FINDINGS OF FACT

On the entire record, <sup>1</sup> including helpful briefs from the Respondent and the General Counsel, I make the following findings of fact. <sup>2</sup>

# I. JURISDICTION

The Respondent, a corporation with an office and place of business in Sand Springs, Oklahoma, has at all times material been engaged in the manufacture of steel tubing. During its business operations the Respondent has annually purchased and received directly from points outside the State of Oklahoma goods and services valued in excess of \$50,000 and in the same periods has sold and shipped goods and services valued in excess of \$50,000 from its facility to points outside the State of Oklahoma.

Based on the above, there is no dispute and I find the Respondent is and has been at all times material an employer en-

<sup>&</sup>lt;sup>1</sup> The General Counsel's motion to correct transcript is granted to the extent it was unopposed. The Respondent's response to the General Counsel's motion opposed three of the General Counsel's proposed corrections and proposed a different correction in a fourth instance. The General Counsel's requested change number eight is granted over the Respondent's opposition. The General Counsel's requested changes 7 and 13 are denied. The General Counsel's requested change number 20 is denied and the Respondent's proposed alternate change is granted. The corrections to the transcript do not change the results here.

<sup>&</sup>lt;sup>2</sup> As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings here are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

gaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

# II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

# III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

The Respondent is an Oklahoma State corporation engaged in the business of manufacturing and distributing steel tubing at a facility in Sand Springs, Oklahoma (the facility or plant). The plant is of substantial size and operates on a 24 hours per day, 7 days per week basis. Shifts run daily on a 6 to 6–12 hour basis. On the plant entrance gate facing out, the Respondent has at all material times maintained a sign which reads:

# WEBCO INDUSTRIES, INC.

# TRESPASSING SOLICITATION AND/OR DISTRIBUTION OF LITERATURE ON THESE PREMISES IS STRICTLY PROHIBITED

At relevant times the Respondent's president and chief operating officer was Dana Weber. Its vice president of operations at Southwest Tube Division, in essence the individual in charge of the plant, at relevant times was William Obermark. Its shift business manager in the Cold Draw Department was Dan Marrs. Its shift business manager in the finishing and shipping area was Dennis Coldiron. These individuals' status as supervisors and agents of the Respondent is not in dispute. The facility is not and has not been organized.

The Respondent at relevant times maintained<sup>3</sup> and posted a written "non-solicitation and distribution of literature policy" which by its terms prohibits all such activities on company property by nonemployees. The policy also prohibits employee solicitation and distribution of literature during the working time of the solicitee or solicitor and in working areas. Employees who violate the policy by its terms are subject to discipline up to and including discharge. This written policy is not under challenge by the General Counsel.

The Union represents employees at another area employer, Sheffield Steel, and in consequence operates a union hall in the community of Sand Springs some 3 to 4 miles away from the Respondent's facility. In February 1997<sup>4</sup> the Union contemplated an organizing drive at the Respondent's plant and held several meetings with certain of the Respondent's employees at the union hall. An organizing committee of the Respondent's employees was formed. At a Friday, February 28 meeting Union Organizer Murlin Andrews passed out blank authorization cards to the 18 or so employee members of the organizing committee and instructed them on how to obtain employee signatures. He testified:

I told them they could hand out cards before work, after work, during breaks, and at lunchtime. I also told them that if they were allowed to talk about hunting or fishing or anything else in the plant during working hours, they was allowed to talk about the Union, but not to stop anybody from working.

Although the Union was involved in organizing activities in March as described below, the campaign was not successful and did not at any time involve the filing of a representation petition nor a demand for recognition. As of the time of the trial the Union was no longer actively seeking to represent the plant employees.

#### B. Events

# 1. Saturday, March 1

# a. Employee activities

Several employees working the Saturday, March 1, 6 a.m. shift engaged in activities that are in dispute. It seems appropriate to discuss their various activities as appears below.

# I. BRAD POWELL

Brad Allen Powell was a weld mill cutoff operator and backup mill operator. He testified he exchanged words about the Union on a single occasion at the beginning of the March 1 morning shift. Mills 1 and 2 were briefly down and the employees who were working with the equipment were standing around. During this downtime Powell spoke briefly to fellow employee Al Tanner. The entire conversation went as follows in Powell's recollection:

I said, "Well, you missed out on a good meeting." He said, "Oh," he said, "what kind of meeting?" I said, "Oh, you know." He said, "No, I don't know." I said, "Oh, you know, about the Union."

The Respondent's vice president, Obermark, testified that it was reported to him that same day that Powell, while he was on worktime, had gone to other people's work stations and invited employees to come to the next union meeting.

# II. FRANK HUBBARD

James F. (Frank) Hubbard Jr. was at the time of these events a quality assurance operator in training. He testified employees had asked him that Saturday morning if he had union cards and he had told them "no," but to come see him at the break. During the break, which he testified he always took in the Tensile room, several employees came in and discussed the Union with him and received authorization cards.

Employee Kerri Elsing testified that she and other employees have for many years taken their workbreaks in the Tensile room<sup>5</sup> located directly across from the lunchroom because it often had better ambient temperature and because employees

<sup>&</sup>lt;sup>3</sup> The policy was established in 1995 and a copy of it was physically attached to employees paychecks and mailed to their homes.

<sup>&</sup>lt;sup>4</sup> All dates hereinafter refer to calendar year 1997 unless otherwise indicated.

<sup>&</sup>lt;sup>5</sup> Presumably "Tensile" as in resistance to breaking under tension. The room was a work area used by quality control operators and straightener operators.

Some dispute occurred respecting whether or not the Tensile room was in fact regularly used by employees as an alternative breakroom. Charles Thornton indicated he had used it as a breakroom on occasion. Dennis Coldiron, however, testified that the Tensile room was not a breakroom and had not been used in such a manner to his knowledge. As will be discussed in greater detail, infra, I found Coldiron to be an unpersuasive witness with a demeanor which convinced me he was testifying not from his own memory of events and circumstances, but rather was describing situations as he believed his employer would have wished they had occurred. He is discredited as to this testimony. In contrast, Hubbard and Elsing, corroborated to a degree by Thornton, gave convincing and detailed testimony respecting the regular and longstanding use of the Tensile room as an ad hoc breakroom by smokers. I credit them and find the Tensile room was used as Elsing and Hubbard describe.

could smoke in that area after smoking had been prohibited in the lunch area. During the normal scheduled break period on the morning of March 1, Elsing testified she was in the Tensile room on break as was Frank Hubbard, who was eating a sandwich. At that time she received a union authorization card from Hubbard and signed it.

Hubbard testified that in the course of his quality assurance duties that morning he was called to various locations within the plant as is normal and dealt with various problems employees were experiencing. He also testified that employees asked him about union matters but that he told them he would talk to them on break

He testified that he had been informed that on that Saturday he was to "to run some tubes on a new eddy current for the Vilter Corporation and take it on a disk," a procedure which involved setting up certain testing equipment he had not done before. Hubbard testified that his work on the Vilter testing was initially delayed that morning because other employees were operating a straightener machine which he needed for his work. Hubbard testified that he was able to gain access to the machine at about 11:30 that morning at which point he worked an hour to an hour and a half attempting to set up the necessary testing equipment. He was unable to accomplish his task. He testified he then telephoned his supervisor, Charles Conn, at about 1 p.m. about the problem and reviewed with Conn what he had tried in attempting to set up the equipment and was given suggestions by Conn as to what he should do in making a further attempt to set up the equipment. Hubbard testified that Conn told him: "[I]f I didn't get it, don't worry about it, don't worry about the setup." At this point in the call, Hubbard was interrupted as will be discussed below.

Charles Conn, the quality coordinator, and Hubbard's immediate supervisor, testified he had a conversation with Hubbard on February 28 in which he told Hubbard the Vilter testing had to be done immediately and was a priority or hot project because the customer needed the material tested and returned so that it could continue its operations. Conn testified he told Hubbard the job needed to be done the next day, Saturday, and also told him that, if there were any problems, Hubbard should call him. Conn recalled Hubbard said he understood the urgency of the project. Conn did not work the next day, but received a telephone call from Hubbard in the early afternoon. Hubbard told Conn he was having trouble setting up the testing equipment and Conn made suggestions as to what procedures Hubbard should attempt.

Thomas Rappsilver, director of quality assurance, testified that he had a telephone conversation with Hubbard at about 11 a.m. on March 1 in which he asked Hubbard how the Vilter job was going and Hubbard told him he was having trouble saving the test results to a computer data disk. Rappsilver testified he told Hubbard to forget about trying to save the information onto a disk, but rather to get the material tested so that it could be shipped to the customer.

Shift Business Manager Michael Tanner testified that he had observed Hubbard on March 1 in various places in the plant, but not at work on the Vilter job, and that he had observed Hubbard during breaktime near the breakroom putting pieces of paper in the pockets of employees. Tanner testified he reported these events to Shift Business Manager Coldiron.

Dennis Coldiron, the supervisor over Hubbard, testified that he had learned the day prior to that Saturday of the importance of the Vilter testing work to be done by Hubbard on March 1 and confirmed that fact with Hubbard at the commencement of the shift on March 1. Coldiron again confirmed with Hubbard the importance of the Vilter project an hour or two later and Hubbard indicated, in Coldiron's memory, that he had not gotten very far on it.

Coldiron testified that while a quality assurance employee such as Hubbard might well go throughout the plant on quality assurance business on a typical day, March 1 was far from typical for him given the urgent Vilter assignment and that in consequence, Hubbard should have concentrated his efforts entirely on the Vilter project which required he be at a given piece of equipment. In such a circumstance, Coldiron testified, the quality assurance problems that arose in the plant should have been referred to Coldiron so that he could deal with them or have others do so and should not have been undertaken by Hubbard.

# III. STEPHANIE ALMY

Employee Stephanie Almy testified she initially took her lunchbreak on March 1 in the lunchroom, but that various conversations about union cards were occurring and she retreated to the Tensile room for greater privacy and there dealt with Frank Hubbard regarding an authorization card, chatted for a time, smoked a cigarette and left. Hubbard recalled that several employees, including Almy, spoke with him about the Union while he was on break in the Tensile room.

Shift Business Manager Michael Tanner testified that he observed Almy talking to Hubbard at the beginning of the shift and about an hour later. As described above respecting Hubbard, Tanner also reported these observations to Dennis Coldiron.

### IV. CHARLES WILLIAMS

Employee Charles Williams testified that on March 1 he had occasion to talk to two employees who he had earlier solicited on behalf of the Union. On this occasion he simply asked them if they had "made up their minds" and the two said they wanted nothing to do with the Union. The conversation ended at that point. Another time that day on the way to the lavatory, Williams and another employee, Dan Gibbs, briefly discussed a union meeting. These comments were overheard by a third employee, Al Tanner, who joined with Gibbs in expressing disapproval of the Union. Williams testified he told the two he did not want to hear any more about it and the conversation ended.

#### V. CHARLES THORNTON

Employee Charles Thornton an admitted union supporter testified that he had been informed the previous day at the union meeting not to solicit employees on worktime and did not do so on March 1. Obermark testified that he learned that Thornton, while attending to some problem at the slitter machine in the early part of the Saturday shift, had talked to one of the people working at that work center inviting him to a union meeting and that Thornton spent some time encouraging the employee to attend even after that employee had rejected the initial invitation. Thornton recalled that when called into a meeting with Obermark and others on March 1 he was accused of talking about the Union with a crane operator but that he could not recall speaking to a crane operator about the Union that day.

# b. The Respondent's dealing with employees

#### I. THE DISCIPLINE OF EMPLOYEES

Vice President of Operations William Obermark testified that he was contacted at his home soon after 9 a.m. by telephone on March 1 and informed that employees were wandering about the plant and were in some confusion respecting certain employees' solicitation of support for the Union. Obermark went to the plant and there consulted with Supervisors Coldiron and Tanner respecting their observations of, and other information respecting, the events of the morning.

Obermark and Coldiron testified that Coldiron reported to Obermark respecting the information reported to him and his own observations of employees' activities that morning. Obermark testified that Tanner and Coldiron related other employees' reports to them that some employees were soliciting for the Union and urging employees to sign authorization cards and/or attend union meetings.

Respecting employee Almy it was reported that a production worker said that she was seen handing out literature at the weld mill furnace exit conveyor station and she was not at her assigned work station. Obermark testified that he was informed that employee Thornton in the early part of the shift had solicited an employee to attend a union meeting and persisted in the face of the employee's professed lack of interest.

Obermark testified that he was informed that Hubbard was perhaps the employee most active in traveling about the plant soliciting employees. Obermark also knew that Hubbard had an important job checking certain product to be shipped to a customer named Vilter. This was a priority job which should have prevented Hubbard from leaving his work station until the job was concluded. Coldiron told Obermark that the Vilter job had not been completed by Hubbard.

Obermark testified that he learned that Powell had left his assigned work station and gone to other employees' work stations to solicit employees to come to the next union meeting while the employees were on worktime.

At about 2 p.m. Obermark met with Hubbard and Almy. Also present were Bob Krewett, manager of human resources, and Dennis Coldiron. Obermark testified that he braced Hubbard with the reports of his activities and asked him about the Vilter job. Hubbard denied the activities attributed to him and indicated he had been having problems with the Vilter job. Finding Hubbard's explanations of the problems he had had with the Vilter job unsatisfactory, Obermark told Hubbard he was in violation of the no-solicitation policy.

Obermark told Almy that he had received information that she had been seen handing out union authorization cards while on worktime. Almy denied doing so on worktime, but rather argued her activities had occurred in the breakroom while she was on her break. Emotions ran high and the meeting apparently became somewhat chaotic. Obermark ultimately told both Hubbard and Almy that each was being put on suspension pending a more complete investigation. Each was issued a written consultation form indicating that the employee had been "[c]onducting solicitation in violation of company regulations" and directing the employee to "discontinue" the conduct. The forms indicated each employee was being suspended. The two then left the facility.

At about 2:30 p.m. Obermark met with Powell and Thornton. Also present were Bob Krewett and Larry Stokes, Thornton's supervisor. Obermark asserted that Thornton had solicited an

employee's support for the Union even after the employee had expressed disapproval, Thornton denied the allegation in some heat. Obermark told Powell he had been violating the nosolicitation rule and Powell admitted he had. Each employee was issued a written consultation or warning form indicating that the employee had been "[c]onducting solicitation in violation of company regulations" and directing the employee to "discontinue" the conduct. Thornton entered on his form a strong denial of the allegation.

Obermark spoke to Charles Williams later in the afternoon in similar circumstances to those described above. He told Williams he had been observed going some distance within the plant to offer two employees union cards which the employees declined to accept. Obermark testified that Williams denied issuing cards, but rather asserted he had simply solicited the employees' support for the Union. Williams was suspended pending further investigation of the events. An employee consultation form was prepared specifying that Williams had been "[c]onducting solicitation in violation of company regulations."

#### II. THE OBERMARK-EMPLOYEE MEETINGS

Obermark testified that later that day he held two meetings—one per shift—to discuss the events of the day. In these meetings he announced that the Union was engaging in an organizing campaign. He discussed the no-solicitation policy, where it was posted, its language and examples of conduct covered and not covered. There was some dispute as to whether or not he referred to the no-solicitation policy as being "posted on the fence." Employees recalled that he did so and Obermark himself testified it was very possible that he had.

Robin Robinette, corporate director of personnel services, was present at these addresses. She recalled that Obermark discussed the no-solicitation policy and illustrated the rule's use of such terms as "non working time" and that Obermark specified that employees could engage in solicitation in areas and at times not covered by the rule. In her Board affidavit she recalled that Obermark referred to the no-solicitation policy as "posted everywhere, on the bulletin boards and out front, i.e., at the fences." At the hearing she indicated she was unsure respecting Obermarks' precise statements in this regard.

### 2. March 2—President Weber's speeches to employees

The Respondent's president and chief operating officer, Dana Weber, conducted two meetings of employees; one for each shift. In each meeting she discussed the events which had occurred earlier in the week, i.e., the Union's organizing efforts, the employee solicitation at the plant, and the Respondent's discipline of the five employees discussed. She also expressed the view of the Respondent that a union was not necessary or desirable at the facility. Referring to the five disciplined employees, she testified that she told the groups that the Union was supposed to warn employees not to violate the Respondent's no-solicitation policy. She, therefore, concluded, she told employees, "so, either the Union failed to warn them or encouraged them to violate the policy." She told the employees that if, in fact, the Union had either intentionally not warned the employees or had suggested that they engage in activities in contravention of the policy, that that would mean that the disciplined employees "had been potentially sacrificed by the Union for the benefit of the Union."

Employee Richard Wilkerson recalled Weber's remarks at one of these two meetings:

Yes, she started out with—with five people had been disciplined on a violation of the company's solicitation policy, and that they had been—they had been suspended on account of that they didn't know what they were doing or had been misinformed or sacrificed for their Union activities.

# 3. March 6—Supervisor Dan Marrs' meeting with department employees

On March 6, at the facility, Shift Business Manager Dan Marrs, in the presence of Supervisor Joe Spencer and the general business manager of the Cold Draw Department, Patricia Jordan, addressed the 15–18 or so employees under his supervision. Employee Richard Wilkerson recalled that Marrs told the employees that the Respondent would bargain with the Union in good faith, if it was voted in, but "wouldn't give [the employees] any more than what we would negotiate for." Wilkerson recalled further:

Joe Spencer. Joe asked—Joe Spencer asked him that if—if the Union was to be voted in, he said, would they—would these guys start with nothing, you know, zero or minimum wage? And Dan goes, "Well, maybe not. Maybe not at that, but they would start at—prob-ably start at our entry levels."

Employee Gary Scholey testified that he attended this meeting and recalled:

[Dan Marrs] said that if we voted a union in, during contract negotiations we would start from ground zero. And Joe Spencer spoke up, said, "Ground zero, I don't understand." Then he said, "Well, ground zero you have nothing, you lose everything." And I asked Dan, I said, "When you say we have nothing, do you mean we have—what we have now we lose that?" And he said, "Yes, you have to negotiate for the wages, vacations, your holiday, all the benefits that you have are negotiated. You have to negotiate for your insurance." He said, "You guys's insurance is really good." He said, "You don't want to gamble and take a chance on losing this."

# Marrs testified:

Now, at any time—at any time during this speech did you tell employees that bargaining started from ground zero?

- A. I may have used that term, either that or from scratch. I was—we were discussing how everything was up for negotiation.
- Q. Did you use that phrase in connection with them getting reduced pay and benefits if they voted in a union?

A. No.

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- Q. Did anyone ask you during this meeting if the company would start bargaining at minimum wage?
- A. Someone said that. You know, when I said everything was up for negotiation, someone asked if that meant we were going to reduce them to minimum wage.
- Q. And who—who asked that question? Was that an employee or a supervisor?
  - A. That was one of the employees.
  - Q. All right. And what did you reply, if anything?
- A. I told them, you know, that we'd have to be stupid to think that they would work for minimum wage. You know, I told them definitely not.
- Q. Did you say anything about taking pay back to entry level pay?

A. No.

Patricia Jordan testified but did not address this meeting. Joe Spencer did not testify.

#### 4. March 15

# I. SUSPENSIONS RECONSIDERED

Obermark went on vacation on March 2 and did not return until the evening of March 12. On March 15 he convened a meeting of the Respondent's supervisory staff to discuss the earlier administered suspensions in light of the investigations undertaken since the events. As to Almy he testified:

We talked—in talking with the supervisor we found it was not [a] supervisor that had seen her, but it was another production worker. So, we talked with that production worker and he said that he had seen her with a handful of these while on break in the lunch room, and that she offered it to Tidwell while they were both on break in the lunch room.

The meeting participants determined that, in light of the facts disclosed in the investigation, the discipline administered to Almy "was not proper" and determined to reinstate her and give her full backpay. Almy was contacted and told to report to work the following day. She did so. In time she received full backpay.

Respecting Williams, it was determined that his conduct merited a 3-day suspension and, given that he had missed more than 3 days of work to that point, he would in consequence receive backpay save for the initial 3-day period of his suspension. Williams was contacted to resume work and did so. A written consultation—final warning form was prepared for and signed by Williams indicating the company investigation had concluded that Williams "made solicitation to at least one employee in the weld mill bay during both [Williams] and [the other employee's] working time." The form continued:

Therefore . . . you have been suspended for 3 days and are receiving a final warning. Any future violation of this or any other Webco policy will result in additional disciplinary action up to and including termination.

Williams thereafter received backpay save for the period of the 3-day suspension.

As to Hubbard, it was determined that the importance of the Vilter job as well as the clarity of the evidence that Hubbard had not been on task on March 1 merited a discharge based on violation of the no-solicitation rule and the Respondent's rule against insubordination. Williams was contacted by Obermark by telephone at his home and informed that his suspension had been converted into a discharge based on violation of the Respondent's no-solicitation and insubordination policies. Hubbard has not returned to the Respondent's employ.

# II. EVENTS RESPECTING THORNTON ON MARCH 14 AND 15

Charles Thornton testified he had known Mark Sparks as a fellow employee for many years and had an easygoing relationship with him. Mark Sparks, however, testified that Thornton was "not his kind of guy." Sparks had worked as a police officer and was or had been a member of the Fraternal Order of Police and this fact was known by Thornton. On Friday, March 14 in the Respondent's breakroom at about 11:15 a.m.—a regular break period—Sparks testified that he observed Thornton speaking on behalf of the Union and that Thornton asked him if he wanted a union card. Sparks recalled he asked for one and,

having received it from Thornton, immediately ripped it up and threw it in the trash in front of Thornton. Thornton did not testify to the events of March 14.

On March 15 during the same break period in the Respondent's breakroom, Thornton, Sparks, and other employees were present. The events are in dispute. Thornton, Sparks, and material handlers employee Everett Moton testified respecting events.

Moton, called as a witness by the Respondent, described the circumstances. Sparks was at a table with other employees, including Moton, when Thornton approached and made a statement to Sparks. At the hearing Moton testified to a certainty that Thornton told Sparks, "I know you will vote for this, for Union ratification because you are a dumb nigger." He also testified, however, that following the remark by Thornton to Sparks, Moton turned to fellow employee Brian Hedges, who was seated near him, and asked Hedges what Thornton had just said. Hedges answered Moton that Thornton had said "dumb and ignorant." Also, contrary to his trial testimony, Moton asserted in an April 11 Board prepared affidavit, "I heard Thornton say clearly ['] you're going to vote—are you going to vote yes?['] But I did not quite hear the rest of it—rest of it because Thornton mumbles when he speaks."

Moton further testified that Thornton's remark prompted Sparks to ask Thornton what he said. When Thornton did not immediately respond, Sparks again asked Thornton what he had said, to which Thornton then replied: "You heard me, you're dumb and ignorant." At this point in the events Moton got up and left. He testified that as he was walking out of the area he turned back to see what was happening and observed that Thornton had returned to the table and had his hands on Spark's shoulders in a casual manner and was smiling. Moton testified he could not hear what words the two exchanged at the time. Moton's affidavit however recites:

I started out the door, Thornton walked over to Sparks and said something to the effect I'll kick the shit out of you. He was smiling as he spoke. I do not recall Sparks saying anything. Thornton grabbed [Sparks'] shoulders playfully just goofing around, and I left at that point.

Sparks testified that on the 15th in the breakroom, Thornton initiated a conversation with him:

[Thornton] told me that I knew who to vote for, that I was his boy, and at the end of the conversation he said that I knew—I knew what was best because I was a dumb nigger.

- O. Did he say anything else to you?
- A. Yes.
- Q. What else did he say?
- A. At the end of the conversation he said, "Come outside and I'll kick the shit out of you."

Sparks testified that, when Thornton made his reference to "dumb nigger," Sparks asked Thornton what he had said. Thornton did not reply and Sparks repeated his inquiry a

second and a third time to which Thornton finally replied: "You are dumb and ignorant." Sparks also recalled that Thornton asked him earlier in the conversation if he was a member of a union and he responded that, if Thornton meant the Fraternal Order of Police, he was. Thornton responded to this, in Sparks' memory: "Oh, yeah, that's correct, you're a member of that pig union, and made snorting noises, then [Thornton] sat back down."

Sparks testified he had not heard Thornton refer to him as a nigger prior to this occasion. Sparks recalled that at the time Thornton asserted he would "kick the shit out of him" Thornton was some ten feet from Sparks. Sparks did not directly corroborate Moton's observation that Sparks and Thornton came to be in physical contact with Thornton smiling during the act. Spark's testified in response to a question from counsel for the General Counsel:

Q. Did [Thornton] put his arm around you in a joking manner when he said, "I'll kick the shit out of you?"

A. He did not have his arm around me at that time.

Thornton testified he believed that Sparks was generally against the Union and, in his memory, on the 15th asked Sparks if he was or had been a member of the Fraternal Order of Police. When Sparks indicated he was, Thornton told him, "that's a labor union, dumb ass," to which Sparks responded that he knew that. Thornton recalled he then asked Sparks, "how come we couldn't have ours." Thornton testified that when Sparks answered that "he did not know" to this inquiry, Thornton then asserted he would "kick the shit out of him." Thornton testified this remark prompted various stock rejoinders from Sparks including, "bring your lunch if you're going to take all year, what Army, and stuff like this."

Thornton contended the entire exchange with Sparks was but workplace repartee undertaken in a light, humorous vein without actual or evident malice or threat. He asserted the exchange was neither angry nor unusual. He specifically denied that he had at anytime called Sparks—"a white man"—" a nigger" and denied using racial slurs but rather asserted he opposed their use by anyone professing the insightful notion that a racial slur "belittles both races."

Sparks testified he reported his version of this event to his supervisor, Shift Business Manager Michael Tanner. Tanner did not address these matters in his testimony. Obermark, however, testified that Tanner in turn reported the matter to him as he was dealing with the discipline issues of the other employees as described above in the early afternoon of the 15th.

In response Obermark called Thornton into a meeting that afternoon with Respondent's agents Bob Krewett and Larry Stokes. These latter two individuals did not testify. Obermark recalled that he told Thornton that the company had received "reports that you have been threatening people, telling them to come outside so you could kick their ass, and you've been using racial slurs." In Obermark's memory Thornton simply defiantly and vulgarly denied all the allegations. Obermark informed Thornton that he was suspended pending further investigation of the matter and filled out an employee consultation form indicating Thornton was involved in "harassment of other employees." Thornton made a vulgar entry of strong disagreement on the form. Thornton was suspended at that point and left the facility.

Thornton recalled the meeting with Obermark but asserted that Obermark never discussed the specifics of the charges

<sup>&</sup>lt;sup>6</sup> Counsel for the Respondent objected to this testimony as hearsay. It clearly is hearsay, but it is also the present sense impressions of Hedges asserted by the declarant immediately after perceiving the event and is therefore not excludable as hearsay under Fed.R.Evid. 803(1). While Hedges did not testify and his absence was unexplained, the availability of a declarant under Fed.R.Evid. 801 is immaterial. The statement is, therefore, properly received as substantive evidence and shall be so considered. My contrary ruling at the hearing is reversed.

against him. He testified he perceived the matter as simply a continuation of the Respondent's earlier assertions he was soliciting employee support for the Union. He specifically denied any reference to alleged racial slurs by him was made by Obermark or the others in the meeting and asserted he did not realize such a claim had been made regarding his own conduct until well after this meeting.

# III. THE RESPONDENT'S POST-MARCH 15 ACTIONS RESPECTING THE THORNTON MATTER

Obermark testified that after the suspension an investigation was initiated. Thus he testified:

And we found that the previous day then, on the 14th, that he was giving Shane Sartin a hard time in the lunch room ask—

Q. What do you mean by hard time?

A. Well, he was asking—asking Shane Sartin to come to a Union meeting and Shane didn't want to do that. And Charlie [Thornton] was telling him he really needed to do this and Shane said, "I don't want to, I don't want to talk about it." And Charlie said, "No, you need to come to this meeting." And Shane told us that he felt he was losing his temper so he got out and left because Thornton has a very intimidating manner.

#### He also testified:

In the lunch room [Thornton] persisted with Shane that he wanted Shane to attend the Union meetings, and Shane told him he didn't want to talk about it, and Charlie persisted and, you know, in an intimidating manner. And Shane felt that he was losing his self-control so he got up and left.

The Respondent's agents also talked to Sparks and Moton about the events of the 15th to insure that there was no question or doubt that Thornton had used the racial epithet. Obermark testified that he was assured that Thornton had called Sparks "a dumb nigger." Obermark testified in response to questions from the Respondent's counsel as to what happened next.

- Q. All right. After you completed your investigation what did you decide to do?
  - A. We decided to terminate Thornton's employment.
  - Q. Why did you make this decision?
- A. Sort of the sum total of the actions. What had happened Friday; he was—he was becoming intimidating; what he did on Saturday; everything together.
  - Q. Saturday, March 15?
  - A. Yes.

- Q. And later you decided to terminate him?
- A. Yes.
- Q. Based on this situation that arose?
- A. No.
- O. Based on what?
- A. More from the-
- O. What more?
- A. The—what he did with Shane Sartin the day before, also his attitude.
- Q. Okay. That was a reason for terminating him, correct?
- A. The Shane Sartin event, plus the racial slur, plus the shouting match.
  - Q. Okay.
  - A. Plus the threat to do bodily harm.

Shane Sartin did not testify. In Thornton's personnel file maintained by the Respondent was a written statement signed by Sartin respecting the events of March 14. The document asserted that Thornton had asked Sartin to vote for the Union and that Sartin told Thornton to "stick it." It further asserts, "After I left the break room I was mad because I didn't want anyone thinking I was for a union. That is why I told him to stick it." Having been cross-examined on the Sartin file statement, Obermark testified he would have terminated Thornton for "the racial slur and the threat of violence to Mark Sparks" even had the Thornton-Sartin conversation on March 14 never occurred.

Following his decision to terminate Thornton, Obermark testified he left it up to the human resources department and lower supervision to inform Thornton of the decision to terminate him

The Respondent terminated Thornton by letter dated April 11 received by Thornton the following day. The letter stated in part:

You are being terminated for harassing and threatening a fellow employee.

Specifically, on March 15, 1997, you referred to Mark Sparks as a "dumb nigger" and said to him "I'll kick the shit out of you." When Sparks tried to walk away from you, you continued to yell at him with additional insult.

### 5. March 16—Supervisor Coldiron's conversation with Almy

Stephanie Almy was notified on March 15 to come to work the next day and did so. On March 16 she came to work on the plant floor when she was taken to the office by Trainer Brian Harmon. She testified she there had a very lengthy conversation with Dennis Coldiron which evolved into a long discussion about the merits of trade unionism. Almy testified that Coldiron told her in this conversation that, if she did not like her job, she should depart. He also said that, if the Union organized the Respondent, bargaining would start from "ground zero" and the employees would suffer reductions in wages and other benefits. Eventually the conversation ended, as Almy recalled:

[H]e sent me back down to the straightener. Then he informed me that next week that he was going to be testing me to see how well I knew the straightener, and that I better know it right and because he could always put somebody else back up on the straightener.

Coldiron testified he did not recall everything he said to Almy on her return to employment, but denied threatening her in any way. Respecting his role in reviewing her work on the straightener machine, he testified it was his job to review her performance, that he had done so prior to March and did so thereafter. Brian Harmon remembered the conversation as quite short and corroborated Coldiron that no improper statements were made to Almy.

# 6. April 4

The Union held two meetings for the Respondent's employees on April 4 at the Sand Springs Sheffield Steel Union Hall: one at 3:30 p.m. and one at 6:30 p.m. At dusk, just before the latter meeting was to start and as attendees were in the front of the hall preparing to enter the building, William Obermark was observed driving by on the fronting public street. That fact was commented on by employees of the Respondent about to enter the building. Richard Wilkerson testified he clearly identified

Obermark as he drove his car by the union hall. Obermark did not address these events in his testimony.

7. The Respondent's enforcement of its no-solicitation policy

Beyond the events of March 1, considerable testimony was received respecting the history of the Respondent's enforcement of its no-solicitation policy. Employees Powell, Elsing, Hubbard, and Ruckman testified that in the breakroom and on the shop floor during worktime with regularity employees sold items such as sausages, candy, telephone services, and football and other sports pools were organized and participation in the pools solicited by employees. Elsing testified that Supervisor Coldiron was personally involved in selling telephone services on the workfloor during worktimes and had solicited her at the plant while she was working. Coldiron denied both the occurrence of such workplace and worktime solicitations generally and his own onsite role in such activities.

There was no real dispute that the Respondent's management and office administration have from time to time observed solicitation by employees, spoken to those employees and directed that they stop such activities. Thus, for example, testimony was received that employees, including supervisors in some instances, have been instructed to stop selling beauty products, raffle tickets to raise money for children's medical expenses, as well as telephone services. Obermark testified that on various occasions he instructed employees to cease proselytizing others regarding religious views, cease selling candy, and stop organizing a football pool. In all cases described, the employee was spoken to and asked to stop his or her conduct and the individual thereafter apparently did so. No "write-ups" or other discipline was ever administered in such "one time" circumstances. In essence management denied that it ever knowingly allowed violations of its no-solicitation policy to occur unaddressed. Further, Obermark testified that it was highly unlikely that such activities could go on in the plant even in remote work areas without his observing such activities inasmuch as he regularly walked the plant.

# C. Analysis and Conclusions

It seems appropriate in this case to approach the complaint generally in a chronological manner with modifications as appropriate.

1. Complaint paragraph 5, subparagraph (a), and subparagraph (b)(i)—Alleged over expansion of the no-solicitation policy

Complaint paragraph 5, subparagraph (a), alleges:

Since about January 1, 1997, [the] Respondent by posting at the gate and fences around the facility, promulgated and since then has maintained the following rule:

Trespassing, Solicitation, and/or Distribution of Literature on these premises is strictly prohibited.

Complaint paragraph 5, subparagraph (b), alleges:

About March 1, 1997, [the] Respondent, by William Obermark, at the facility:

(i) informed employees that the rule referred to above in paragraph 5(a) was posted on the gate through which the employees came to work.

In paragraph 7 of the complaint this conduct is alleged to violate Section 8(a)(1) of the Act.

As discussed above, the Respondent has had at all relevant times a written no-solicitation policy which is not under facial attack by the General Counsel. The language of the complaint paragraph at issue here describing a far broader prohibition is taken from the language of the outward facing signs at the Respondent's facility. The General Counsel does not challenge the rule as set forth on the signs as they apply to nonemployees or, it seems clear from the record and brief despite the language of the complaint itself, that the fact of placing the language on outward facing signs was a violation of employee rights. Rather, the General Counsel argues that the repeated references to the signs by Obermark in his discussion of the no-solicitation rule in employee disciplinary sessions and in his speeches and remarks to employees, in effect, incorporated the broad prohibitions of the sign language into the Respondent's no-solicitation rule and, therefore, improperly expanded and then applied that overbroad rule to employees within the plant premises. The General Counsel further argues that the act of announcing that improperly expanded rule to employees also violates the Act.

The Respondent first argues that Obermark did not refer to the signs as contended by the General Counsel or did so only tangentially. Second, the Respondent argues with a nice bit of language that the General Counsel's theory of "incorporation" is "imaginative but hollow" (R. Br. 12.), because the employees were at all times clear that the signs were for outsiders and not applicable to employees on site.

While not set forth in each of the recitations above, employee witnesses did attribute to Obermark statements including the signs on the fences in his references to the locations of Respondent's publications of its no-solicitation rule. Indeed, Obermark himself did not truly deny doing so. Rather, he simply professed no current recollection of his assertions. His Board prepared affidavit described a portion of his conversation with Almy and Hubbard in their disciplinary interview, "I told the two that they all received the rule in their manuals, that it was posted on the bulletin boards, and that it was posted on the fence that they went past each day." I find that Obermark made this statement to Almy and Hubbard and made similar remarks to other employees.

While I have sustained the General Counsel's factual contention, I reject his further argument that this conduct commingled the two rules—one for employees on site and one to outsiders—tainting the employee nonsolicitation rule and rendering it a violation of the Act. While such a theory of a violation is plausible in certain factual settings no doubt, on the facts of this case, Obermark's comments to employees while perhaps inartful, clumsy, and wrong, when considered in the entire context of those remarks, may not fairly be said to have misled or have been reasonably likely to have misled employees as to the true rule under discussion.

This is so because in each of the conversations alleged by the General Counsel as commingling the proper narrow employee no-solicitation rule with the broader general prohibition rule applicable to outsiders, Obermark made it very plain by explanation and illustration that the conduct prohibited under the no-solicitation and no-distribution rule was limited to employees on working time and in working areas and made it clear that there were areas and times within the plant when the no-solicitation rule did not apply. These remarks were of sufficient clarity, in my view, that the references to the physical signs facing outward on the plant fences was not enough in the entire context of events to mislead employees. This is particu-

larly true when there was absolutely no evidence that any manager or agent of the Respondent ever characterized its employee no-solicitation rule as being a broad prohibition of conduct or ever applied its rule to employees in any such fashion.

Given all the above, I find that Obermark's statements were not violative of Section 8(a)(1) of the Act. Accordingly, I find the General Counsel has not sustained the burden he bears on establishing a violation of the Act in this regard, and I shall dismiss paragraphs 5(a) and 5(b)(i) of the complaint. I do not, however, find the General Counsel's allegations and theory of a violation of the Act in these regards to be "frivolous," as asserted by the Respondent on brief at 13 and, therefore shall not consider the various special measures the Board applies to parties who have asserted frivolous claims.

# Complaint paragraphs 5, subparagraphs b(ii), (iii), (iv), and Discipline for March 1 employee union solicitation and distribution

Complaint paragraph 6 alleges that, on March 1, the Respondent issued written warnings to employees Brad Powell and Charles Thornton and indefinitely suspended employees Stephanie Almy, Charles Williams, and Frank Hubbard. It further alleges that the Respondent suspended its employee Williams on March 15 and thereafter discharged its employee Hubbard. Complaint paragraph 5, subparagraphs b(ii) through b(iv) alleges that Obermark told the employees named above that they were disciplined for soliciting and handing out literature for the Union.

# a. Argument of the parties

The discipline administered by the Respondent is not in contest nor is the fact that the reasons asserted for the discipline by the Respondent were the employees' union activities. The Respondent avers it was privileged to take the March 1 action it did because of the existence of and consistent and benign application of a valid no-solicitation/no-distribution rule to the employees' actions on that day. The General Counsel argues the no-solicitation/no-distribution rule was selectively and improperly applied to the union activities of these employees by the Respondent in two ways. First, the General Counsel contends the no-solicitation rule<sup>7</sup> was not consistently applied to prohibit union solicitation. Second, the General Counsel argues that the rule was not fairly applied to the employees in that no discipline was ever administered to first offending employees who violated the no-solicitation rule in a nonunion context, but such discipline was administered to the instant employees who were thought to have engaged in union solicitation and distribution. The Respondent contests the Governments claim of selective enforcement of the rule. It also argues that the circumstances of March 1 were different from and deserved greater discipling than earlier violations of the rule because of the occurrence of the conduct by several employees on the same shift at approximately the same time and on the day an important project was underway.

#### b. Resolution of factual disputes and witness

# Credibility Issues

As noted above, the evidence concerning enforcement of the rule was to a certain extent in dispute. The Respondent's evidence of its agents' enforcement of the rule as described above was not directly challenged and is credited. Thus, I find that in some cases of proselytizing, sales, and other forms of solicitation, the Respondent's management invoked the no-solicitation no-distribution rule to instruct certain employees to stop engaging in such solicitation.

The General Counsel's evidence, as noted above, that at least in the plant away from the administrative offices, at least certain times during the plant's 24 hours a day, 7 days a week operation, employee solicitation for the sales of phone service products, children's affinity group sale items such as cookies and solicitation of participation in employee recreational activities such as plant sports event pools was common and unencumbered by supervisory enforcement of the no-solicitation rule even to the extent of participation by supervisors, including Coldiron, in such activities.

Coldiron and other of Respondent's witnesses, including Obermark, denied observing the activities described by the General Counsel's witnesses and made it clear that they would have been in a position to observe such employee activities had they occurred. Coldiron specifically denied Elsing's claim that he had solicited her to buy telephone services at the plant on worktime.

I resolve these evidentiary conflicts in large part on demeanor grounds, but also on the probabilities relevant to the events and on the entire record. First, I generally discredit Coldiron whenever his testimony is inconsistent with that of Elsing. Elsing appeared to me to be a truthful witness describing the events from her memory without editing or emendation. To the contrary, I was convinced by Corldiron's demeanor that he was not relating his memory of events, but rather was simply testifying to what he believed would best serve his employer's interests and his own. He seemed willing to deny anything he thought it might be uncomfortable to admit. I explicitly find he did attempt to sell phone services to Elsing at the plant on her worktime and discredit his denial. I further discredit his testimony that he had no occasion to observe or be involved in the other sales and solicitation activities described by the General Counsel's witnesses. Rather, I credit their testimony that such events occurred.

As to Obermark, my findings respecting his surveillance of the union meeting, infra, suggest he was not as indifferent to the protected union activities of the Respondent's employees as he suggested in his testimony. I do not, however, discredit his testimony that open or obvious solicitation inconsistent with the no-solicitation rule did not occur in his presence without disapproving action by him. His statements that such conduct would have been observed by him if it had been at all regular in its occurrence, however, is not so convincing. As the high official at the plant, it is quite likely that employees and first-level supervisors would defer solicitation or any other actions not consistent with plant rules in his presence. In a large facility operating on a 24-hour basis 7 days a week, it is not impossible, as I do here, to credit both the testimony of the manager of the plant that he did not see violations of the solicitation rule as well as the testimony of various employees that conduct in violation of the rule was relatively commonplace. Importantly however on this record and based in part on my observation of Obermark's demeanor as he testified to these matters. I also find that as the

<sup>&</sup>lt;sup>7</sup> Having found, supra, that the Respondent's no-solicitation nodistribution rule was not fatally tainted by Obermark's reference to the broader rule applied to nonemployees, the references hereinafter to the rule is to the facially unchallenged rule, quoted, supra, maintained by the Respondent as part of its governing rules and regulations.

high official who had a style and practice of "management by walking around" at the facility for a substantial period of time, that Obermark was also either aware or reasonably should have been aware that such conduct was in fact occurring at the plant, albeit to a degree quietly concealed from high management officials.

On this record, to say that the officials at the plant, including Obermark, were not aware—even if they were unwilling to openly or officially countenance such activity—that the employees on the shop floor and on the weekends were not engaging in solicitation and participation in sports pools such as college and professional football game pools—a nigh ubiquitous aspect of American workplace culture and one not unknown to Oklahoma residents-and other solicitation inconsistent with the Respondent's rule would be absurd. Further it would be inconsistent with the credited testimony of first-hand witnesses who described the conduct in persuasive detail. I explicitly find the conduct occurred and that the Respondent's agents, particularly Obermark, knew or should have known of it. It is not improbable that managers are willing to tolerate certain essentially benign activities by employees, if they are not conducted overtly, or in a manner overtly challenging to or contemptuous of the company's rules and if they can in effect avoid situations where they are charged with direct knowledge of the conduct.

# c. The law of enforcement of no-solicitation/ no-distribution rules

The parties were not in particular dispute about the relevant law to apply to these elements of the complaint. Further, the interesting evolution of the concept of an employer nosolicitation rule as it may be applied to employee union activities is not relevant here for the Government is not challenging the no-solicitation/no-distribution rule of the Respondent beyond the outside sign argument, rejected supra. A facially valid no-solicitation/no-distribution rule, if consistently enforced and applied to activities within its terms, may be applied to prohibit union activities as well as other activities falling under the terms of the rule. This element of the law is not in dispute. A rule, howsoever facially valid, however, may not simply be kept on the books and held in abeyance or reserve to be applied only to union activities of employees. Nor may a facially valid rule be applied so inconsistently or selectively that it is in effect and practical application only a rule against employee union or protected activity. Finally, the punishments or discipline meted out under the rule must be proportionate to the conduct involved, as compared to other applications of the rule, and not treat employee union or protected concerted activities more harshly because of the union or concerted aspect of the activity.

The Board in *Hammary Mfg. Corp.*, 265 NLRB 57, 57 fn. 4 (1982), addressed the issue of consistency of a no-solicitation rule's application:

The Board and the courts consistently have held that an employer does not violate Section 8(a)(1) by permitting a small number of isolated "beneficent acts" as narrow exceptions to a no-solicitation rule. See, e.g., Serv-Air, Inc. v. NLRB, 395 F.2d 577 (10th Cir. 1968), on remand 175 NLRB 801 (1969); Emerson Electric Co., U.S. Electrical Motors Division, 187 NLRB 294 (1970). Thus, rather than finding an exception for charities to be a per se violation of the Act, the Board has evaluated the "quantum of . . . incidents" involved to determine whether unlawful discrimination has occurred. See,

e.g., Serv-Air, 175 NLRB 801 (1969); Saint Vincent's Hospital, 265 NLRB 38 (1982).

Further the Supreme Court in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), made it clear that if an employee is discharged for misconduct arising out of protected activity and that misconduct never in fact occurred, the employer's good-faith belief that the conduct occurred is not a defense to the violation of the Act. Thus, in considering the application of the nosolicitation/no-distribution rule by the Respondent to those who received discipline herein, the actual conduct engaged in by the employees rather than what the Respondent mistakenly believed the employees were doing at relevant times will determine if the Act has been violated as alleged.

# d. Analysis and conclusions respecting the Respondent's rule and its application to the employees' March 1 activities

At the threshold I reject the argument of the General Counsel that the Respondent so consistently ignored constant, ongoing employee and supervisory violations of its no-solicitation/no-distribution rule that the rule must be considered only an anti-union activities' rule and must be rejected as any part of a defense to actions taken against employee union activity. As found, supra, the Respondent's managers had repeatedly applied its rule to both employees and supervisors in a variety of settings and circumstances. The exceptions to its enforcement as found above are further considered below.

I have found that employees and supervisors engaged in prohibited solicitation under the rule on the factory floor on a regular basis when management, in effect, was not looking or at least was not looking very hard. Further, I have found that agents of the Respondent, including Obermark, were aware of the existence of at least some prohibited employee activities and did not act without exception to enforce the rule in such situation. Applying the Board's *Hammary* rule to those exceptions, I do not find the quantum of exceptions tainted or invalidated the rule. Rather, I find the tolerance or acquiescence of the Respondent's agents to some types of violations is a factor to be considered in evaluating whether or not the rule was applied more rigorously to employee union soliciting activities than other solicitations of employees.

Having found that the Respondent could apply the rule to union solicitation and distribution as it had to other solicitation and distribution, it remains to be determined if the Respondent in fact did so properly in administering the challenged discipline. The issue of disproportionate application of punishment or discipline for violations of the rule must be resolved on an individual-by-individual basis. It is appropriate, therefore, to turn to the individual employees disciplined under the rule.

# (1) Employee Stephanie Almy

The Respondent suspended Almy on March 1 pending further investigation and reinstated her with full backpay on March 15 when Obermark concluded she had not in fact violated the no-solicitation rule. Under the teaching of *NLRB v. Burnup & Sims*, supra. the Respondent violated Section 8(a)(1) of the Act by suspending her for misconduct arising out of protected concerted and or union activities which misconduct in fact never occurred.<sup>8</sup>

<sup>8</sup> The Respondent argues the Respondent's subsequent correction of its "error" is sufficient and no violation should be found or remedy directed. It is not clear that the Respondent's records respecting the

# (2) Employee Charles Williams

As discussed above, employee Charles Williams described two events on March 1. The first involved his asking two employees if they had made up their minds respecting the Union and the second involved mentioning a union meeting to an employee, which remark was overheard by and commented on by a third employee. The employees Williams spoke to were not in favor of the Union. Obermark testified that he had learned and told Williams in their meeting on March 1 that he had learned that Williams had offered two employees cards away from his work area and that Williams had denied handing out cards to employees but readily admitted he had solicited employee support for the Union. Williams was suspended pending further investigation and for conducting prohibited solicitation.

On March 15, the Respondent determined that Williams had in fact been soliciting at least one other employee during work-time and that an appropriate punishment for this was a 3-day suspension. Given that Williams had missed some 2 weeks of work by March 15, he was immediately reinstated and paid backpay for the period of his suspension save for the 3 days of formal punishment.

Two separate issues arise from this series of events: first, was the total suspension proper and, second, within that total suspension, was the 3-day suspension proper. The total suspension, minus the 3-day suspension considered separately below, is simply a reprise of the Almy analysis immediately above. The Respondent's March 1 to 15 suspension was simply too great a punishment under the application of the rule's history under any analysis, including the Respondent's own on March 15. A mistakenly harsh punishment for misconduct during protected concerted or union activities violates Section 8(a)(1) of the Act.

The second issue may be stated in its most refined form taking the Respondent's March 15 findings respecting Williams as true: Was it a permissible application of the Respondent's nosolicitation/no-distribution rule to suspend Williams for 3 days for soliciting another employee while each was on worktime? For the reasons which follow, I find the 3-day suspension in

suspension were expunged or that Almy was regarded thereafter by the Respondent as never having been suspended for purposes of seniority and benefit calculations. Further the Respondent, as discussed supra, told employees that the disciplined employees had themselves and/or the Union to blame. This false assertion to employees was admittedly never corrected by the Respondent. Finally, the suspension itself could not be undone and, even where reinstatement and a back-pay payment has been made, the effect on the employee and other employees may be reasonably considered to be lasting. Given all the above, I find no basis to disregard the violation. The remedy will of course not include restoration of benefits and wages already paid by the Respondent or interest on such payments.

<sup>9</sup> The conclusions reached herein would not differ if the solicitations advanced by the Respondent as violations of its rule in the cases of the disciplined employees other than Hubbard had not in fact occurred. Therefore, it is unnecessary to resolve the discrepancies between the employees' testimony of the extent and nature of soliciting and distribution and the Respondent's evidence on the question. Were it necessary to resolve these disputes, based on my evaluiations of demeanor and resolutions of credibility as set forth in part elsewhere in this decision, I would credit the employees and find that their conduct did not extend beyond that they each described. See, for example, my analysis of the discipline administered to Thornton, infra.

such circumstances was not permissible and violated Section 8(a)(1) of the Act.

It is important initially to set forth what is not the basis for finding a violation here. I have found the Respondent's rule is not improper either facially or as a result of its selective application to employees' protected or union activities. Thus, I find that the Respondent could have invoked its no-solicitation/no-distribution rule to command a halt to employee activities in breech of the rule including worktime union solicitation and distribution of authorization cards. Repeated violations of the rule could have been punished by invoking proportionate discipline for such repeat offenses by employees. The Respondent's workplace is for work and it may insure that this is so by proper application of its rules.

What supports and sustains a violation here, in my view, is the severity of the punishment administered and its disproportion to the conduct at issue when compared and contrasted to the substantial history of the rules application to activities which were neither protected concerted nor union activity. In numerous other situations involving commercial product sales, eleemosynary solicitations, and religious proselytizing, <sup>10</sup> employees acting in violation of the rule were asked to stop their conduct and did so without any other formal action or punishment taken against the offending employee. Only the union solicitation was punished without warning and with serious discipline. On this record, I find that the Respondent was not attempting to utilize its rule to stop solicitation. If it wanted to do that it would have taken the same actions it had taken numerous times before—ask the employees to stop. Rather, I find the Respondent chose to make examples of the soliciting employees to chill support for the Union<sup>11</sup> and to demonstrate to employees that the Respondent held plenary power over their employment and that supporting the Union could only cause them harm. 12 The Respondent's no-solicitation/no-distribution rule as it had historically applied it to solicitation to March 1 will not support or allow such a result.

The Respondent argues that the instant situation differed from earlier situations where the rule was applied to direct the cessation of individual employee activities without administering punishment in that the instant case involved many employees on the same shift at the same time engaging in parallel conduct. There might well be situations in which a significantly different setting or context might provide a basis for new and different levels of punishment. I do not find this to be the case herein however. The conduct involved here for which discipline was administered was not a coordinated, sustained course of conduct. Williams readily admitted his simple solicitation, and the Respondent thereafter confirmed but a single such ac-

To the extent it may be argued that union organizational solicitation was a matter of controversy among employees and therefore might be expected to be more disruptive than other types of solicitation, I find such activity in that regard to be akin to proselytizing which also has the potential to engender passionate feelings among those solicited. In the one situation where such a proselytizing employee was told to stop his activities, no further action or punishment was taken against him

<sup>&</sup>lt;sup>11</sup> See the discussion, infra, respecting the Respondent's president's use of the punishment administered on March 1 to suggest that the Union may well have "sacrificed" these employees.

<sup>&</sup>lt;sup>12</sup> In making this finding, I rely in part on my other findings here that the Respondent was simultaneously engaged in a series of illegal addresses to employees disparaging the Union and wrongfully suggesting the futility to employees of obtaining union representation.

tion. The other disciplined employees, disregarding Hubbard whose circumstances differ and are discussed infra, also engaged in relatively benign and isolated acts of solicitation which in their totality do not rise to a level of activity warranting a new and different punishment for the violations of the rule.

Accordingly, based on all the above and the record as a whole, I find that in suspending Williams, both initially for the 2-week period and thereafter in reducing the suspension to 3 days, the Respondent violated Section 8(a)(3) and (1) of the Act

### (3) Employee Brad Powell

Brad Powell testified that he had had a single conversation with another employee on Saturday morning during a period of equipment downtime. Obermark testified that he learned that Powell had left his assigned work station and gone to other employees' work stations to solicit employees to come to the next union meeting while all employees were on worktime and that, when braced with these reports, Powell agreed he had been soliciting. Powell received a written warning for "[c]onducting solicitation in violation of company regulations" and directing him to "discontinue" the conduct.

While the punishment is not as severe as that meted out to others on March 1, I find the Respondent's conduct violative of Section 8(a)(3) and (1) the Act. I reach this result in part from the analysis set forth immediately above. Further, from Obermark's perspective, Powell, when told he had acted in violation of the rule, freely agreed that he had and did not resist the correction. Powell's conduct that morning, even if as assumed for the purposes of this analysis to be as Obermark believed and in violation of the rule, <sup>13</sup> was not particularly disruptive nor provocative. Given the substantial and consistent history of informal dealing with first time violators who did not challenge the Respondent's authority, I find insufficient basis to justify the departure from that consistent prior conduct herein.

Accordingly, based on all the above and the record as a whole, I find that in issuing a warning to Powell the Respondent violated Section 8(a)(3) and (1) of the Act.

# (4) Employee Charles Thornton

Obermark testified that he learned that Thornton had solicited another employee to attend a union meeting even after the employee had expressed a lack of support for the Union. Thornton denied ever doing so both at the hearing and in his meeting with Obermark. Obermark's information came largely from Supervisors Coldiron and Tanner who related their own observations and other employees' reports. Tanner did not testify about Thornton's March 1 activities nor did Coldiron.

Because of the belligerence with which Thornton denied the actions attributed to him by Obermark, I find that it would not have been unreasonable for the Respondent to warn Thornton not to continue his actions, if he had in fact engaged in the conduct Obermark accused him of. Since Thornton denied that he had engaged in such conduct, I find it is necessary to resolve this factual dispute in order to determine if the Act was violated as alleged.

I found Thornton to be a truthful witness with a convincing, if somewhat belligerent or defiant demeanor. I credit his version of his activities on March 1 over the substantive value of the second-hand reports Obermark received from observers

who did not testify as to their own observations. Obermark could truthfully and persuasively testify as to what he was told by others, but that does not sustain the accuracy of their out of court, uncross-examined accounts. And, as discussed elsewhere in this decision, I have doubts respecting the veracity of at least some of the observers who reported to Obermark. I find, therefore, that Thornton was not in violation of the solicitation rule on March 1. As noted, supra, under the *Burnup & Sims* doctrine, Obermark's beliefs respecting Thornton's conduct are immaterial. The Respondent violated Section 8(a)(3) and (1) when it issued a warning to Thornton for violating its no-solicitation rule through his union activities when no such violation of the solicitation rule on this record may be found to have occurred. Accordingly, I sustain the General Counsel's complaint allegation.

# (5) Employee Frank Hubbard

Obermark testified that he was informed that Hubbard was perhaps the employee most active in traveling the plant and soliciting employees. He also knew that Hubbard had an important job checking on the product to be shipped to Vilter, a priority job, that should have prevented his leaving his work station. Coldiron told Obermark that the Vilter job had not been completed and placed the blame on Hubbard.

Hubbard testified that he answered various calls for help throughout the plant on the morning of March 1. Coldiron and others, as discussed supra, testified that the urgency of the Vilter job required that Hubbard forego lending such assistance and concentrate on the Vilter job.

Hubbard was suspended on March 1. His consultation form prepared that date indicates he was "conducting solicitation in violation of company regulations." On March 15 Obermark reviewed the Respondent's investigation of Hubbard's conduct and found his solicitation and distraction from the Vilter job merited his discharge.

As with Thornton above, assuming the Respondent's beliefs respecting Hubbard were true, the Respondent may well be justified in its discipline of Hubbard. The General Counsel advances Hubbard's version of events which are significantly different from the Respondent's. It is, therefore, necessary, as in the instance of Thornton, supra, to resolve these conflicting versions of what took place.

The Respondent's rationale for the discharge is that Hubbard was soliciting improperly and was "insubordinate" in not exclusively attending to the Vilter job on March 1 which was in consequence not finished in a timely manner. Substantial testimony was received respecting the importance of the Vilter job and the fact that the Respondent, its supervisors and Hubbard all recognized its importance. The Respondent's witnesses, Supervisor Charles Conn, Conn's supervisor and director of quality assurance, Thomas Rappsilver, and Supervisor Dennis Coldiron, all testified that Hubbard simply had no excuse or rationale for leaving the Vilter job until its completion on March 1 and that his admitted wanderings through the plant on the morning of March 1, in conjunction with his concomitant failure to complete the Vilter job, was a major act of insubordination on Hubbard's part.

Frank Hubbard had a sound demeanor and seemed to me to be testifying truthfully respecting his memory of events. So,

<sup>&</sup>lt;sup>13</sup> See fn. 9, supra.

<sup>&</sup>lt;sup>14</sup> Not all this testimony was consistent. Hubbard testified he was told on the telephone midday on March 1 by Supervisor Charles Conn he did not have to finish the job. Conn denied this was so.

too, however, did Messrs. Conn and Rappsilver and they were in the main corroborated by Coldiron. Given the uncontroverted importance of the Vilter job and the fact that it was Hubbard's assignment on March 1, I find the probabilities favor the Respondent's witnesses' testimony that Hubbard was obligated under all the circumstances to stay at the Vilter task and not leave it. Whether or not Hubbard should be discredited or rather a finding made that he was simply confused in his job assignment on March 1 and did not understand what was expected of him, I need not decide. Rather, I find that the Respondent had assigned the Vilter task to Hubbard and had a good-faith belief that he was not dedicated to that very important task on the morning of March 1. The Vilter job was not protected activity to which the *Burnup & Sims* doctrine applies.

The General Counsel argues that the no-solicitation rationale advanced by the Respondent is invalid and taints the entire termination. Thus, the General Counsel takes the position that Hubbard was fired for the argued violation of the no-solicitation rule and, even if he should have been undertaking the Vilter job, the improper invocation of the no-solicitation rule—either based on a factual conclusion that Hubbard had not violated the rule or based on an overly severe punishment for his misconduct, sustains the violation alleged. The Board in Wright Line, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), established a test for approaching discrimination allegations which was recently restated in Manno Electric, 321 NLRB 278–280, fn. 12 (1996):

Under [the Wright Line] test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Office of Workers Compensation Programs v. Greenwich Collieries, [114 S.Ct. 2251, 2257–2258 (1994)], at 2258.

Assuming, without deciding, that the General Counsel has met his burden of persuasion that an improper application of the no-solicitation rule was a substantial or motivating factor in Hubbard's termination, and explicitly shifting the burden of persuasion to the Respondent, it is necessary to consider the argument of the Respondent that it would have fired Hubbard for not completing the Vilter job in all events, even had there never been an organizational drive at the Respondent's facility or had Hubbard never even been suspected of soliciting for the Union.

Turning to that issue, and based on the record as a whole and the mutually corroborative testimony of the Respondent's witnesses, I find that the Respondent would have fired Hubbard as it did, even if there had been no union activity underway at the Respondent and the Respondent had no belief that such activities were under way. Based on the credited testimony and the record as a whole, I find that, irrespective of the union solicitation issue, the Respondent: (1) regarded the Vilter job as critical, (2) regarded the completion of the Vilter job as Hubbard's responsibility on March 1, (3) concluded that Hubbard was not obeying his superiors' clear instructions in not devoting himself exclusively to the Vilter job the morning of March 1 and finally and most importantly, (4) regarded Hubbard's failure as a dischargeable offense independent of the solicitation issue. There-

fore, I find that the Respondent has not violated the Act with respect to the discharge of Hubbard. Accordingly, I also find that the General Counsel has not sustained the allegations of the complaint respecting Hubbard's suspension and discharge and they shall be dismissed.

# (6) The derivative complaint paragraphs

Complaint paragraph 5, subparagraphs b(ii) through (iv), allege that Obermark told the employees named above that they were disciplined for soliciting and handing out literature for the Union. Since I have found, supra, that the Respondent's discipline of Almy, Williams, Powell, and Thornton was improper, it follows that Obermark's telling them they were disciplined for soliciting support for the Union was itself a derivative violation of Section 8(a)(1) of the Act. The relevant allegations of the complaint are sustained.

# 3. Complaint paragraphs 5, subparagraphs (c), (d), and (e)—Respondent's remarks to employees

Complaint paragraph 5, subparagraph (c), alleges that the Respondent's president, Dana Weber, violated Section 8(a)(1) of the Act at employee meetings by "disparaging the Union, stating that the Union sacrificed five employees whom Respondent suspended for violating the [no-solicitation rule]."

As more fully set forth supra, there is no doubt that Weber told two meetings of plant employees held to discuss the Union's organizational efforts, the Respondent's position on the campaign and the discipline meted out on March 15. President Weber told the employees in her remarks that the Union was supposed to warn employees not to violate the Respondent's no-solicitation policy. She added: "So, either the Union failed to warn them or encouraged them to violate the policy." She further recalled she told the employees that if, in fact, the Union had either intentionally not warned the employees or had suggested that they solicit employee support for the Union, in spite of the Respondent's no-solicitation/no-distribution policy, that would mean that the disciplined employees "had been potentially sacrificed by the Union for the benefit of the Union."

The Respondent's high official made these remarks in meetings held by the Respondent to oppose the Union's organizing drive and to convince employees not to support the Union. The speeches followed on the day after the three employees had been suspended and two had been issued warnings by the Respondent for violations of the no-solicitation rule. I have found that four of the five acts of discipline were illegal actions of the Respondent. Indeed by the Respondent's own subsequent determination, Almy's suspension was simply wrong and Williams was over 10 days too long.

In reality, the discipline was not the result of the Union sacrificing its supporters, but rather the result of the Respondent illegally terminating and warning four of the five employees involved. Thus, in a meeting called by the Respondent in order to persuade its employees to oppose or at least withhold support

<sup>&</sup>lt;sup>15</sup> I have not determined whether or not Hubbard was improperly suspended and discharged for solicitation inasmuch as I found he would have received that punishment in all events for other conduct. Therefore, it is not yet determined if Obermark telling him he was disciplined for his solicitation also violated Sec. 8(a)(1) of the Act. In light of my finding a violation with respect to the parallel conduct of the Respondent to the other employees, resolving this issue would not add to the type of violations found or the remedy directed. I shall, therefore, not further consider that narrow allegation respecting Obermak's statement to Hubbard.

for the Union, the Respondent's president essentially blamed the Union for causing adverse actions to be taken against the employees who supported the Union which actions were in fact with but a single exception the result of the illegal acts of the Respondent.

Without citation of authority, the General Counsel argues such disparaging conduct violates Section 8(a)(1) of the Act. The Respondent argues the statements were simply Weber's opinion on a matter which employees were capable of evaluating for themselves and thus protected by Section 8(c) of the Act citing Camvac International, 288 NLRB 816 (1988).

The Respondent's argument fails on two grounds. First, the statements of the Respondent's president were not about a matter that employees were able to evaluate for themselves They clearly had no way of knowing that the Respondent's illegal actions rather than the Union's conduct underlay the bulk of the discipline meted out by the Respondent. Second and, importantly, I find the statements were made in bad faith with a knowledge of their less than complete truth.<sup>16</sup> This is a critical finding for the Board holds that where the employer "seized on this incident as a pretext to disparage and undermine the Union in the eyes of the employees" Section 8(a)(1) of the Act is violated. I so find here.

Complaint paragraph 5, subparagraph (d), asserts that on or about March 6, Dan Marrs told employees that bargaining would start at ground zero and informed employees that it would be futile for them to select the Union as their bargaining representative. As discussed, supra, employees Wilkerson and Scholey supported the complaint allegation. Supervisor Marrs recalled using either the terms "bargaining started from ground zero" or from "scratch," but denied using those words in a context suggesting employees would suffer loss of pay or benefits. I found Wilkerson and Scholey sound witnesses. Marrs was less persuasive and his explanation of his use of the terms at issue was not convincing. Further, as noted supra, the Respondent's agent, Jordan, did not address this conversation in her testimony and its agent, Spencer, did not testify. I credit the two employees, discrediting Marrs where his version differs.

Having found that Marrs told employees that if the Union came to represent them they would bargain from ground zero and would suffer a reduction in wages and working conditions, I further find that such remarks violate Section 8(a)(1) of the Act. I therefore sustain this section of the amended complaint.

Complaint paragraph 5, subparagraph (e), alleges that Dennis Coldiron on March 16 solicited employees who supported the Union to quit their jobs, threatened employees with loss of benefits if they selected the Union as their bargaining representative, told employees that in such circumstances wages would start at the employees' entry level pay and informed its employees that it would be futile to select the Union as their bargaining representative.

These allegations were supported by Stephanie Almy, who testified that Coldiron spoke to her at great length upon her return to work following her suspension. Coldiron denied the statements attributed to him and further denied that the rein-

statement conversation lasted as long as Almy described. Trainer Brian Harmon, who works under Coldiron's supervision, testified that he was asked to be present at this conversation by Coldiron as a witness and corroborated Coldiron as to the conversation's length and content.

The length of the conversation testified to by Almy seems improbable to me and Coldiron's denials of Almy's attributions were corroborated by Harmon. Even considering these factors and the burden of proof the General Counsel bears on the allegation, I credit Almy over Coldiron and Harmon. I found Almy a highly credible witness with a very persuasive demeanor and Coldiron the reverse. Harmon's generally corroborative denials respecting these contested events did not in my view tip the scales against Almy on this record. On this series of events, given the significant difference in demeanor of the witnesses in context and the belief I formed respecting Almy's memory and truthfulness, I find the events occurred as she described them. I discredit Coldiron and Harmon where their version of events differs.

Having made these factual resolutions, the legal arguments supporting the violation are not in serious dispute. The conduct alleged in the complaint paragraphs noted occurred as alleged and violate Section 8(a)(1) of the Act. I so find.

# 4. Complaint subparagraphs 6(d) and (e)—Thornton's suspension and discharge

The events of March 14 and 15 and the Respondent's investigation of those events and actions against Thornton based thereon were in substantial dispute. There was no doubt that the events all occurred in the context of Thornton's support for and solicitation of others to support the Union or that the Respondent suspended and thereafter discharged Thornton for alleged misconduct occurring during solicitation of support for the Union. It seems at least initially relevant to determine what actually occurred on those occasions.

# a. The events of March 14

Thornton was continuing his habit of seeking support from other employees for the Union in the breakroom on March 14. Crediting Sparks unchallenged testimony about his exchange with Thornton in the breakroom that day, I find that Thornton asked Sparks if he wanted a union card. Sparks asked for a card which Thornton gave him, at which point Sparks taking the card, immediately ripped it up and threw it in the trash in front of Thornton.

Thornton also had a conversation with Cold Draw employee Shane Sartin in the lunchroom on March 14. Thornton did not address the events of the 14th in his testimony. Sartin did not testify nor did anyone else testify who was directly witness to the Thornton-Shane events. As noted supra, Obermark testified that in the Respondent's investigation of the Sparks-Thornton incident the next day Sartin reported on his exchange with Thornton on March 14. Obermark recalled specifically:

And Shane told us that he felt he was losing his temper so he got out and left because Thornton has a very intimidating manner.

In the lunch room [Thornton] persisted with Shane [Sartin] that he wanted Shane to attend the Union meetings, and Shane told him he didn't want to talk about it, and Charlie persisted and, you know, in an intimidating

<sup>&</sup>lt;sup>16</sup> For example, the employees who were suspended were suspended pending further investigation. Two, thereafter, had their sentences reduced. At the time of the contested speeches the Respondent well knew that the matters were not established as described. And, of course, as I have found above, in actuality, four of the five actions taken were in violation of the Act.

<sup>&</sup>lt;sup>17</sup> Sheraton Hotel Waterbury, 312 NLRB 304 fn. 3 (1993).

manner. And Shane felt that he was losing his self-control so he got up and left.

The Respondent also obtained and maintained in its personnel files a signed statement of Sartin about the events which, while not offered into evidence by any party, contained Sartin's written assertion that Thornton had asked Sartin to vote for the Union and that Sartin told Thornton to "stick it." The statement further asserts, "After I left the break room I was mad because I didn't want anyone thinking I was for a union. That is why I told him to stick it." Obermark, shown the document, suggested that the quoted portion of Sartin's statement's "verbiage does not adequately describe the atmosphere," but did not suggest that the Respondent was privy to a source of information regarding the exchange other than Sartin. Nor was the remainder of the Sartin statement proffered as an exhibit or through testimony.

#### b. The events of March 15

As described in greater detail above, there are strongly conflicting versions of the March 15 exchange between Thornton and Mark Sparks. Most critical to the allegations of the complaint is resolution of the questions of whether or not Thornton used the disputed phrase "dumb nigger" and whether or not the context of Thornton's admitted statement to Sparks that he would or should "kick the shit out of him" was from Spark's perspective an intimidating remark fairly taken as a threat of a physical beating or rather as a jocular workplace exhortation made in evident humor and good spirits and not reasonably taken by someone in Spark's position as threatening in any manner.

Turning to the "dumb nigger" issue, having carefully reviewed the entire record and in particular the testimony and statements of all the relevant witnesses regarding these events, I find that the witnesses who testified they heard Thornton use the term "dumb nigger" were mistaken. More particularly, I find Thornton did not use those freighted words on March 15 for the following reasons.

There are several elements of the larger sequence of events which lead me to this conclusion. First, Moton testified that immediately after Thornton spoke the contested words to Sparks—words that Moton testified he was certain included the phrase "dumb nigger," Moton turned to another employee, Hedges, and asked Hedges what Thornton had just said. Hedges responded, in Moton's testimony—as does his Board affidavit—suggests that Moton's certainty at trial respecting the inclusion of the words "dumb nigger" in Thornton's words to Sparks was not evident immediately after their having been spoken. Rather, the sequence of events casts doubt on Motin's veracity as a witness.

Second, the exchange itself between Sparks and Thornton as testified to by Sparks and Moton has Thornton utter the original insulting phrase then has Sparks ask Thornton several times what he had just said. There is no dispute that Thornton finally replied, "You heard me, you're dumb and ignorant." While it could be argued that Thornton having initially used an insulting but obviously prohibited phrase, had instant second doubts about his conduct and quick to attempt to cover his tracks thereafter denied using the term, I reject this argument as it might apply to Thornton. Thornton struck me strongly as an individual who, while impulsive and clearly willing to speak roughly and act outside conventional proprieties, would be very

unlikely to suffer self doubts about such conduct or ever feel the need to immediately retract or deny his earlier actions. Thornton, it seems to me, based on this record, would very much more likely brazen out his outrageous conduct rather than attempt to conceal or deny it. Thus, if Thornton had called Sparks a "dumb nigger" he would not have concealed that fact seconds later before passions had cooled by claiming to Sparks that he had rather used the words "dumb and ignorant."

Perhaps closer to the heart of the matter, I found Thornton to be a truthful witness who seemingly as a matter of world view or personal self image would not shelter or shade his description of his conduct. While his demeanor was belligerent and defiant on the stand and while he was willing to quibble and disagree with his inquisitors as a witness, I was strongly convinced of his willingness to tell what he recalled of events without censuring his recollection to put his conduct in a better light. I found Moton to be a far less convincing witness both based on his demeanor and based on the evidence noted that suggest that his convictions respecting what Thornton said only came later, well after the event. I had a similar doubt respecting Spark's forthrightness as a witness.

Finally, consistent with the above analysis, I find it somewhat incongruous for one white man to call another a "nigger," an insulting pejorative of tragically wide use historically by all races, but essentially without exception directed at black persons. This is particularly true where there is no record suggestion that Thornton or indeed any of the employees at the plant used such language at the workplace in reference to individuals of any race. <sup>18</sup>

Turning to the second critical element of the Sparks-Thornton exchange, Sparks testified that at the end of their conversation Thornton told him: "Come outside and I'll kick the shit out of you." Thornton agreed that he made such a remark, but suggested it was made with a smile and in a jocular vein and that it produced from Sparks a similarly light-hearted reply such as "bring your lunch if you're going to take all year, what Army, and stuff like this."

Moton's testimony on this point is highly relevant. He testified that as he was walking out of the area he turned to see what was happening and observed that Thornton has returned to the table and in a casual manner had his hands on Spark's shoulders, smiling. Moton testified he could not hear what the two said at the time. Moton's affidavit however recites:

I started out the door, Thornton walked over to Sparks and said something to the effect I'll kick the shit out of you. He was smiling as he spoke. I do not recall Sparks saying anything. Thornton grabbed his shoulders playfully just goofing around, and I left at that point.

This evidence corroborates Thornton's testimony. Based on it and my substantial faith in the general veracity of Thornton's testimony, I credit Thornton over Sparks and find the "kick" remark was made jocularly and that Sparks knew and evidenced in his jocular reply to the statement that Thornton's

<sup>&</sup>lt;sup>18</sup> There was some evidence introduced of employee use of the word in other contexts and an occasion of its use against a black man by an employee who, in, suffered from the Respondents' active disapproval on learning of such conduct. These are, however, exceptions which rather prove the rule that, happily, the term was rarely used as a racial epithet to demean a black.

remark was not serious or threatening.<sup>19</sup> I also reach this result, because I place little faith in Spark's testimony. His demeanor was not convincing. Further, Sparks was clearly both hostile to Thornton and the Union before the exchange on the 15th. Spark's apparently unprovoked action of soliciting a union card from Thornton and then ripping it up essentially in Thornton's face on the 14th suggests, if anything, that he was defiant of Thornton rather than intimidated by him.<sup>20</sup>

# c. Conclusions respecting Thornton's suspension and discharge

Having found that the alleged misconduct occurring during Thornton's ongoing solicitation of support among his fellow employees for the Union that was the Respondent's asserted basis for Thornton's suspension and discharge did not occur, I further find the Respondent's discharge and suspension of Thornton for such misconduct in the course of protected activity violated Section 8(a)(1) of the Act irrespective of whether or not the Respondent's had a good-faith belief that the misconduct occurred or that it warranted the discipline administered. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

Given the *Burnup & Sims* doctrine, it is not necessary to consider the belief of the Respondent to resolve the allegation of the complaint. Were it necessary to do so, I would further find that the Respondent did not in fact have a good-faith belief that the misconduct of which Thornton was accused occurred or that, had it occurred, it would have justified Thornton's discharge on the facts of this case. Obermark testified that Thornton's intimidation of Sartin on the 14th and his conduct on the 15th were each factors in his discharge. The record gives no suggestion that the Respondent had any other source of information about Sartin's contacts with Thornton other than Sartin himself. Yet, Sartin's statement, presumably prepared by and certainly maintained by the Respondent, did not support the Respondent's conclusion that Sartin was intimidated by Thornton

Further Moton's version of events—and Obermark testified that Moton reported to the Respondent—made it clear that Thornton at the end of the March 15 conversation had walked over to Sparks and, in a casual manner—"playfully just goofing around," while smiling, put his hands on Spark's shoulders. Thus, like Sartin, Moton's report of the events does not comport with the version of events which Obermark testified he relied on to take action against Thornton. Yet these two individuals, Sparks and Sartin, are by Obermark's own admission two of his primary sources of information. I simply cannot accept that Obermark believed that Thornton, a longtime employee, was now suddenly a threatening and intimidating individual who merited discharge based on these reports. Rather I

find that, at best, Obermark selected bits of the reports and wove them together into a tapestry of misconduct in an attempt to justify the discharge of an active public supporter of the Union who had continued to support the Union and exhort other employees to support the Union even after the Respondent's prior violations of the Act as described, supra.

Obermark, in a remarkable description of Thornton, suggested that for his 13 years of employment Thornton, a Vietnam veteran who favored horrific stories of the carnage of that war, had been consistently, indeed, ostentatiously belligerent, erratic, and implicitly menacing at the workplace as a personal affectation or style.<sup>22</sup> Thornton, as characterized by Obermark, had been sufficiently abhorrent in his behavior and conduct with other employees for years as to have merited at least a warning or other discipline simply for day-to-day workplace menace and oddity. Obermark however testified that this overt and repeated conduct had never resulted in the Respondent's discipline of Thornton until Obermark concluded from the events on the 14th and 15th of March that "he was becoming intimidating." This scenario when viewed in the context of the entire record in this matter strikes me as wildly improbable. Obermark painted the picture of a man who had been seemingly on the edge for years. The Respondent in effect had tolerated Thornton's maelstrom for more than a dozen years and was now suspending Thornton for creating a questionable squall on March 14 and 15. Of course the challenging conduct now involved solicitation of employee support for the Union. Based on the entire record including consideration of Obermark's demeanor as a witness respecting this portion of his testimony, I simply do not accept the truth of his disavowal of a malign motive for suspending Thornton.<sup>23</sup> Rather, I find that the Respondent through Obermark seized on the events of March 14 and 15 and used them as a pretext to discharge a very public supporter of the Union who would not have been fired if the conduct had not involved union activities. Such conduct violates Section 8(a)(3) and (1) of the Act as alleged in the complaint.

# 5. Complaint paragraph 5, subparagraph (f)—Obermark's surveillance of a union meeting

Complaint paragraph 5, subparagraph (f), alleges that on April 4 Obermark drove slowly past the union hall at a time when it was being used by the Union and the Respondent's employees for a union meeting and in so doing engaged in surveillance of employees union activities. As noted, supra, there was unrebutted mutually corroborative testimony sustaining this allegation of the complaint. No evidence was offered by the Respondent to deny, explain, or mitigate Obermark's conduct. Based on this essentially uncontested event and the Board's long-standing prohibition of such conduct, I find that the Respondent engaged in surveillance of employees' union

<sup>&</sup>lt;sup>19</sup> The ivory tower setting of the courtroom or the law library should not deceive observers that industrial worksite conversations between part-time policemen and Vietnam veterans have elements of coarse and defiant or challenging language. As Judge Barker stated with Board approval in *Silver Bay Local 962 (Alaska Lumber)*, 198 NLRB 751, 761 fn. 29 (1973), when judging incidents regarding whether or not employees were placed in fear of imminent or foreseeable physical danger the context of the events must be borne in mind and that certain locations and occupational processes "tend to screen out the timid or faint of heart."

<sup>&</sup>lt;sup>20</sup> The two men are not significantly different or disproportionate in

<sup>21</sup> Obermark recanted this testimony in his later examination. I found this recantation unpersuasive.

<sup>&</sup>lt;sup>22</sup> For example, Obermark testified about Thornton:

I have seen him bite at bolts and nuts while he was working. If someone—if a group of people, particularly production people, were around him, people that did not understand him, he would like bite at bolts and nuts or act like he's chewing nails.

<sup>&</sup>lt;sup>23</sup> The Respondent argues that Thornton's failure to assert his innocence in his meeting with Obermark beyond crude global denials supports the Respondent's decision to terminate Thornton. I agree but do not find the support sufficient to overcome the very substantial evidence commanding the opposite conclusion.

activities in violation of Section 8(a)(1) of the Act. I sustain this allegation of the complaint.

# 6. Summary

In summary, I have found that the Respondent did not violate Section 8(a)(1) of the Act as alleged in complaint subparagraphs 5(a) and 5(b)(i) by incorporating a general prohibition of all solicitation as posted on exterior signs at the plant into the Respondent's employee no-solicitation, no-distribution rules. These allegations of the complaint will be dismissed.

I have found that that the Respondent did not violate Section 8(a)(3) and (1) of the Act as alleged in complaint paragraphs 6(a) and (c) or 5(b)(ii), (iii), or (iv) respecting Frank Hubbard. These complaint allegations or portions of allegations will be dismissed.

I have found that the Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraphs 5(b)(ii), (iii), and (iv) respecting employees Almy, Williams, Powell, and Thornton, and paragraphs 5(c), (d), (e), and (f). These complaint allegations or portions of allegations are sustained.

I have found that the Respondent violated Section 8(a)(3) and (1) of the Act as alleged in complaint paragraphs 6(a) as to employees Almy and Williams, Section 6(b), (c), (d), and (e). These complaint allegations or portions of allegations are sustained.

#### THE REMEDY

Having found that the Respondent has violated the Act, I shall direct it to cease and desist therefrom, and take certain affirmative action in order to effectuate the purposes and policies of the Act, including the posting of a remedial notice consistent with the Board's recent modifications to its standard remedies in *Indian Hills Care Center*, 321 NLRB 87 (1996).

I shall direct the Respondent to rescind the March 1997 discipline administered to employees Stephanie Almy, Charles Williams, Brad Powell, and Charles Thornton and offer immediate reinstatement to employee Charles Thornton. The Respondent shall be directed to make each individual whole, with interest, for any and all losses of wages and benefits the employees would have received, but for the Respondent's wrongful discipline of them. The make-whole remedy shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977), with interest, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall further order the Respondent to delete and expunge from its records all references to the relevant discipline of these employees and notify each of them in writing that this has been done and further assure them that the fact of their discipline will not be used against them in future.

# CONCLUSIONS OF LAW

- 1. The Respondent is and has been at all relevant times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:
- (a) Disparaging the Union to employees by falsely telling them that the Union was responsible for the discipline and discharge of four of the Respondent's employees on March 1, 1907
- (b) Telling employees that if the Union came to represent them bargaining would start from ground zero or would start at employees' entry pay levels, and that it would be futile for them to select the Union as their bargaining representative.
- (c) Telling employees who supported the Union to quit their jobs.
- (d) Threatening employees with loss of benefits if they selected the Union as their bargaining representative.
- (e) Engaging in surveillance of employees' attendance at union meetings.
- (f) Telling employees improperly disciplined for their union activities that they had been punished for soliciting employee support for the Union and handing out union literature.
- 4. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following acts and conduct:
- (a) Issuing written warnings to employees Brad Powell and Charles Thornton.
- (b) Indefinitely suspending employees Charles Thornton, Stephanie Almy, and Charles Williams.
  - (c) Discharging employee Charles Thornton.
- 5. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.
- 6. The allegations of the complaint not specifically found to violate the Act above are without merit and shall be dismissed.

[Recommended Order omitted from publication.]